

have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the employer conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(g) Each employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

[59 FR 62230, Dec. 2, 1994]

#### **§ 653.49 Return to duty testing.**

(a) *Return to duty.* An employer shall ensure that, before returning to duty to perform a safety-sensitive function, each covered employee who has refused to submit to a drug test or has a verified positive drug test result—

(1) Has been evaluated by a substance abuse professional to determine whether

the covered employee has properly followed the recommendations for action by the substance abuse professional, including participation in any rehabilitation program;

(2) Has taken a return to duty drug test with a verified negative result. If a test is canceled, the employer shall require the employee to take another return to duty drug test.

(3) A substance abuse professional may recommend that the employee be subject to a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02, to be conducted in accordance with 49 CFR part 40.

(b) *Marine employers.* Marine employers subject to U.S. Coast Guard chemical testing regulations shall ensure that each covered employee who has a verified positive drug test result administered under this part is evaluated by a Medical Review Officer.

#### **§ 653.51 Follow-up testing.**

Each employer shall ensure that each covered employee who returns to duty after a required evaluation made under § 653.37 is subject to unannounced follow-up drug testing as provided for in § 653.63(d). The employer may require the employee to take one or more follow-up alcohol tests, with a result indicating an alcohol concentration of less than 0.04, as directed by the SAP, to be performed in accordance with 49 CFR part 40.

### **Subpart D—Drug Testing Procedures**

#### **§ 653.61 Compliance with testing procedures requirements.**

The drug testing procedures of part 40 of this title apply to employers covered by this part, unless expressly provided otherwise in this part.

#### **§ 653.63 Substance abuse professional.**

(a) An employer's anti-drug program shall have available the services of a designated substance abuse professional.

(b) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result is in need of assistance in

resolving problems associated with prohibited drug use. The substance abuse professional then recommends a course of action to the employee.

(c) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result has properly followed the SAP's recommendations.

(d) The substance abuse professional shall determine the frequency and duration of follow-up testing for a covered employee. Such employee shall be required to take a minimum of six follow-up drug tests with verified negative results during the first 12 months after returning to duty. After that period of time, the substance abuse professional may recommend to the employer the frequency and duration of follow-up drug testing, provided that the follow-up testing period ends 60 months after the employee returns to duty. In addition, follow-up testing may include testing for alcohol, as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40.

**§ 653.65 Supervisor acting as collection site person.**

An employer shall not permit a direct supervisor of an employee to serve as the collection site person for a drug test of the employee.

[59 FR 7589, Feb. 15, 1994. Redesignated at 60 FR 12297, Mar. 6, 1995]

**Subpart E—Administrative Requirements**

**§ 653.71 Retention of records.**

(a) *General requirement.* An employer shall maintain records of its anti-drug program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified period of time, measured from the date of the document's or data's creation. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years:* Records of covered employee verified positive drug test results, documentation of refusals to take required drug tests, and covered employee referrals to the SAP, and copies of annual MIS reports submitted to FTA.

(2) *Two years:* Records related to the collection process and employee training.

(3) *One year:* Records of negative drug test results.

(c) *Types of records.* The following specific records must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iv) Documents generated in connection with decisions on post-accident drug testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a drug test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to referral and return to duty and follow-up testing:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for referral for assistance in resolving problems associated with drug use.

(ii) Records concerning a covered employee's entry into and completion of the program of treatment recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.

(ii) Names of covered employees attending training on prohibited drug use